

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TABITHA S. PRANKER

Claimant

V.

SHAWNEE COUNTY

Self-Insured Respondent

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Docket No. 1,046,943

ORDER

STATEMENT OF THE CASE

Respondent appealed the June 9, 2016, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth. John J. Bryan of Topeka, Kansas, appeared for claimant. Karl L. Wenger of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 9, 2016, preliminary hearing and exhibits thereto; the transcript of the November 10, 2015, preliminary hearing; the transcript of the June 10, 2014, preliminary hearing; the transcript of the October 20, 2011, preliminary hearing and exhibits thereto; the transcript of the July 27, 2012, deposition of claimant and exhibit thereto; and all pleadings contained in the administrative file.

ISSUES

By agreement of the parties, the ALJ ordered claimant to be evaluated by Dr. Lanny W. Harris to determine what medical treatment was necessary to cure and relieve the effects of claimant's work injuries in her upper extremities. The doctor ultimately recommended claimant undergo bilateral EMGs to determine if she had bilateral carpal tunnel syndrome. Respondent refused to authorize the EMGs. In the June 9, 2016, Preliminary Hearing Order, the ALJ stated:

The Court now finds as follows:

1. IME physician, Dr. Lanny W. Harris, has examined the Claimant and has opined, inter alia, that additional diagnostic testing EMG is required before claimant's arm condition can be adequately diagnosed.

2. The above opinion is clearly and unequivocally expressed in his recent report.
3. Similar, prior diagnostic tests have been conducted but not recently. Dr. Harris' report notes that he is aware of the prior testing.
4. Claimant[']s arm condition is the focus of this claim and the IME confirms the work related injury as the prevailing factor.

THEREFORE, THE ABOVE CONSIDERED, THE COURT ORDERS

- The IME physician, Dr. Lanny W. Harris is specifically authorized to perform, or refer claimant for, such additional diagnostic test[s] as are reasonably necessary to enable the IME physician to provide the opinions therein requested.
- Further, the IME physician is authorized to provide appropriate medical treatment to help heal or cure injuries suffered from claimant's above stated work related injury.¹

Respondent appeals and asserts claimant did not sustain personal injury by accident arising out of and in the course of her employment. Respondent also asserts Dr. Harris was unaware of claimant's multiple prior negative EMG results and is less credible than Dr. Michael Hall, an orthopedic surgeon, who was aware of all of claimant's prior negative EMG results. Respondent also asserted the ALJ exceeded his authority in granting medical benefits.

Claimant asserts the Board has no jurisdiction to determine if claimant suffered personal injury by accident arising out of and in the course of her employment because that issue was decided by the ALJ in an October 21, 2011, order, which was never appealed. If the Board has jurisdiction, claimant asks the Board to find claimant sustained personal injury by accident arising out of and in the course of her employment and the ALJ did not exceed his authority in granting benefits.

1. Does the Board have jurisdiction to determine whether claimant sustained personal injury by accident arising out of and in the course of her employment?

2. If the Board has jurisdiction to consider respondent's appeal, did claimant sustain personal injury by accident arising out of and in the course of her employment?

3. Did the ALJ exceed his authority by ordering medical treatment for claimant?

¹ ALJ Order at 1.

FINDINGS OF FACT

Claimant worked in respondent's motor vehicle division where she assisted approximately 100 customers a day to register their motor vehicles. She constantly entered information into a computer using a keyboard and attributes her bilateral carpal tunnel syndrome to that activity. She asserts her date of accident was March 5, 2009, the date she was taken off work by a physician. Claimant last worked for respondent in December 2010. Since then, claimant's employment has been minimal. Her counsel proffered that she has earned less than \$6,000 since last working for respondent.

At an October 20, 2011, preliminary hearing, respondent contended claimant did not meet with personal injury by accident arising out of and in the course of her employment. Claimant requested medical treatment with Dr. Lynn D. Ketchum, who evaluated claimant at her counsel's request on July 20, 2011. A copy of the doctor's evaluation report was placed in the record. Dr. Ketchum indicated claimant did not have carpal tunnel syndrome, but the doctor thought claimant had thoracic outlet syndrome and stenosing tenosynovitis of her left thumb. He recommended a triamcinolone injection on the left and thoracic outlet exercises under the supervision of a physical therapist. Dr. Ketchum apportioned 50 percent of claimant's medical issues to heavy work with her foster son and 50 percent to her employment with respondent.

In an October 21, 2011, order, former ALJ Brad E. Avery ruled claimant sustained an accidental injury arising out of and in the course of her employment and ordered medical treatment with Dr. Ketchum. That order was not appealed to the Board.

At a November 10, 2015, preliminary hearing, the parties agreed claimant was to be evaluated by Dr. Harris. ALJ Roth issued an order indicating Dr. Harris should determine what medical treatment was necessary to cure and relieve the effects of claimant's work injuries in her upper extremities. If claimant was at maximum medical improvement, Dr. Harris was to render a functional impairment opinion in accordance with the *Guides*.²

Dr. Harris evaluated claimant on December 19, 2015. The doctor indicated claimant had a prior EMG, which was normal. Dr. Harris noted claimant stopped working for respondent in 2010. Claimant reported having a long history of pain in her hands and receiving a number of injections and surgery on her left hand. She reported recurring tingling and numbness in both hands. The doctor indicated claimant underwent bilateral EMGs in 2009.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Harris conducted an extensive physical examination of claimant for carpal tunnel syndrome and thoracic outlet syndrome, including several tests. The doctor recommended claimant undergo repeat EMGs of both upper extremities. If the EMG results were positive, Dr. Harris recommended surgery and if not, he did not recommend further treatment at that time. Although this is a pre-2011 amendment claim, the doctor opined the prevailing factor for claimant's carpal tunnel symptoms was her job with respondent.

Respondent refused to authorize the repeat EMGs recommended by Dr. Harris and a preliminary hearing ensued on June 9, 2016. Claimant was unavailable to testify due to a family emergency. Respondent introduced results of March 17 and October 12, 2009, bilateral EMG tests. Both test results indicated claimant had a normal study with no clear findings for cervical radiculopathy or upper extremity neuropathy.

At the June 9, 2016, preliminary hearing, a report was placed into evidence from Dr. Hall, who evaluated claimant at respondent's request on March 3, 2014. The doctor indicated claimant's left hand was operated on for four of five trigger fingers. He noted claimant had multiple negative EMGs, but had been given injections in 2009 to relieve left carpal tunnel symptoms. Dr. Hall indicated claimant also received right thumb and left ring finger injections from Dr. Ketchum in 2013.

According to Dr. Hall, claimant reported her left ring finger continued to pop, she had no strength in either hand and her right hand was going numb and pointed to her thumb, index finger and middle finger. Claimant also reported having sharp numbness on the right with tingling at rest at night. Her pain was worse in the left hand when her ring finger got stuck.

Dr. Hall's impressions were:

1. Hypermobility.
2. Lateral band subluxation of the left ring finger not related to her job.
3. Numbness and tingling to her fingertips, not related to her job.
4. Possible right carpal tunnel syndrome, not related to her job.
5. Right trigger thumb, not related to her job.
6. History of thoracic outlet syndrome, not present and not related to her job.³

In an April 2, 2014, letter to respondent's attorney, Dr. Hall opined claimant's trigger fingers and carpal tunnel syndrome were not related to her typing. He opined claimant had no functional impairment in either hand.

³ P.H. Trans. (June 9, 2016), Resp. Ex. C at 2.

PRINCIPLES OF LAW AND ANALYSIS

Claimant asserts the Board has no jurisdiction because an October 21, 2011, preliminary hearing order concluded claimant sustained personal injury by accident arising out of and in the course of her employment and the order was never appealed. The Board denied a similar request in *Wilson*.⁴ *Wilson* requested the Board dismiss his employer's appeal because the ALJ previously determined in a preliminary hearing order, which was not appealed to the Board, that claimant's left knee injury arose out of and in the course of his employment with respondent. Claimant argued respondent was required to appeal that decision to the Board and could not request multiple preliminary hearings on the same issue. The Board Member deciding *Wilson* stated:

The Board has had the opportunity on other occasions to address this same issue. The Workers Compensation Act does not limit the number of preliminary hearings that can be held in a particular case.⁵ The Board generally agrees that multiple preliminary hearings should not be conducted where there is no new evidence to present. But the Board believes that the [ALJs] have discretion to conduct such additional preliminary hearings as they determine needed and appropriate.⁶

The undersigned Board Member concludes the Board has jurisdiction to consider whether claimant sustained personal injury by accident arising out of and in the course of her employment.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁸

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is

⁴ *Wilson v. Watkins Auto Salvage*, Nos. 265,834 & 265,835, 2002 WL 31103976 (Kan. WCAB Aug. 29, 2002).

⁵ See K.S.A. 44-534a.

⁶ See [*Besler v. Sabatini Trust*, No. 236,676, 2001 WL 403292 (Kan. WCAB March 27, 2001)] and [*Perrill v. Wesley Medical Center*, No. 233,702, 1999 WL 123252 (Kan. WCAB February 19, 1999)].

⁷ K.S.A. 2008 Supp. 44-501(a).

⁸ K.S.A. 2008 Supp. 44-508(g).

not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁹

Three physicians rendered causation opinions. Dr. Hall opined claimant's carpal tunnel syndrome and trigger fingers were not related to her typing. Dr. Ketchum apportioned 50 percent of claimant's medical condition to her employment with respondent. Dr. Harris opined the prevailing factor for claimant's bilateral carpal tunnel symptoms was her work activities. This Board Member gives most credence to Dr. Harris' opinion. The parties agreed to have Dr. Harris independently evaluate claimant. He conducted an extensive physical examination of claimant. He was aware claimant had not worked for respondent since 2010 and that she had a prior negative EMG. Dr. Harris indicated he was aware claimant underwent bilateral EMGs in 2009. That is contrary to respondent's allegation that Dr. Harris was unaware of claimant's multiple prior EMGs.

The ALJ had the authority to order medical treatment for claimant. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary disability compensation.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

WHEREFORE, the undersigned Board Member affirms the June 9, 2016, Preliminary Hearing Order entered by ALJ Roth.

IT IS SO ORDERED.

Dated this ____ day of August, 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

¹⁰ K.S.A. 2015 Supp. 44-534a.

¹¹ K.S.A. 2015 Supp. 44-555c(j).

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Honorable Steven M. Roth, Administrative Law Judge